RECORD NO. 15-7027

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

CANDICE MILES,

Plaintiff – Appellant,

v.

HOWARD UNIVERSITY,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici in the District Court and this Court:

i. Appellant/Plaintiff Candice Miles

ii. Appellee/Defendant Howard University

iii. Defendant University of the District of Columbia (not a party to this appeal)

B. Rulings under Review:

i. The Hon. Reggie B. Walton's Order and memorandum opinion filed March 16, 2015, granting Appellee/Defendant Howard University's Motion for Motion for Summary Judgment, J.A. at 1034, 1035-1066. *Miles v. Howard Univ.*, 83 F. Supp. 3d 105 (D.D.C. 2015).

C. Related Cases:

None.

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GLOSSARY

"Miles"	Appellant Candice Miles
"Howard"	Appellee Howard University
"FMLA"	Family and Medical Leave Act, 29 U.S.C. §§ 2611-19 (2012)
"DCFMLA"	District of Columbia Family and Medical Leave Act, D.C. Code §§ 32-501 to -517 (2001)
"DCHRA"	District of Columbia Human Rights Act, D.C. Code §§ 2-1401.01 to -1431.08 (2001)
"UDC"	University of the District of Columbia
"Title VII"	Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2012)
"DC SBDC"	District of Columbia Small Business Development Center Network
"SBA"	Small Business Administration
"UDC"	University of the District of Columbia
"AEDC"	Anacostia Economic Development Corporation
"ASBDC"	Association of Small Business Development Centers
"SOP"	Standard Operating Procedures
"the Lead Center"	Howard's Lead Center

STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia ("District Court") had subject matter jurisdiction over this civil action arising under the laws of the United States pursuant to 28 U.S.C. § 1331.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to hear this appeal from the District Court's final decision filed March 16, 2015, granting Appellee/Defendant Howard University's Motion for Motion for Summary Judgment on all causes of action set forth in Appellant/Plaintiff Candice Miles's First Amended Complaint.

On March 20, 2015, a notice of appeal was timely filed with the District Court.

This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

I. Whether the District Court erred by granting summary judgment in Howard's favor when it credited evidence proffered by Howard and failed to acknowledge key evidence offered by Miles as the bases for determining that Howard was not a joint employer of Miles and thus could not be held liable for violations of the FMLA, DCFMLA, DCHRA, or Title VII.

II. Whether the District Court erred in granting summary judgment on the bases that Howard presented evidence of a "legitimate business reason" for terminating Miles's employment and that Miles had not met her burden to present evidence from which a reasonable jury could find that Howard's stated reason was pretext because it credited evidence proffered by Howard and failed to acknowledge key evidence offered by Miles.

STATUTES AND REGULATIONS

Pertinent statutes are set forth in the Addendum to this Brief.

STATEMENT OF THE CASE

Appellant Candice Miles ("Miles") filed this civil action on March 12, 2012, against Appellee Howard University ("Howard"), alleging violations of the federal Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2611-19 (2012), the District of Columbia Family and Medical Leave Act ("DCFMLA"), D.C. Code §§ 32-501 to -517 (2001), and the District of Columbia Human Rights Act ("DCHRA"), D.C. Code §§ 2-1401.01 to -1431.08 (2001). Miles initially named the University of the District of Columbia ("UDC") as a co-defendant, but she dismissed all claims against UDC prior to the close of discovery.

On May 2, 2012, Howard and UDC filed motions to dismiss Miles's complaint, and on September 30, 2013, the District Court denied Howard's and UDC's motions to dismiss and granted Miles' motion for leave to amend her complaint to add a claim asserting violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to e-17 (2012). Miles took discovery on the claims asserted in her amended complaint, averring that Howard was liable to her for retaliation and/or interference in violation of the FMLA and the DCFMLA, as well as gender and/or familial responsibility discrimination and retaliation in violation of the DCHRA and gender discrimination in violation of Title VII. On March 16, 2015, the District Court awarded summary judgment to Howard on all of Miles's claims, and Miles filed her notice of appeal on March 20, 2015.

Statement of the Facts

Howard operates the Lead Center for the District of Columbia Small Business Development Center Network ("DC SBDC"), which provides small business development services in the District of Columbia through individual Service Centers. J.A. at 758. Howard funds DC SBDC through a grant provided by the Small Business Administration ("SBA"). J.A. at 758. Until 2011, Howard awarded sub-grants to the University of the District of Columbia ("UDC"), the Anacostia Economic Development Corporation ("AEDC"), and the D.C. Chamber of Commerce to operate DC SBDC Service Centers. J.A. at 759. DC SBDC is accredited by the Association of Small Business Development Centers ("ASBDC"). J.A. at 763.

While the Service Centers are physically located at the host institutions, Howard exercises tight control over the operations of each Service Center. Oversight of each Service Center Director is "the exclusive purview of the Lead Center" and each Center Director reports directly to the Executive Director of the Lead Center. J.A. at 797, 820. Howard imposes certain goals on Service Centers as means of performing DC SBDC's contract with SBA. J.A. at 812. With respect to UDC in particular, Howard unilaterally modified the Service Center's goals after UDC and the Lead Center had agreed to them. J.A. at 812. Importantly, where Howard's oversight ends on paper, it leverages its ability to terminate grant funding to pressure the host institution to control the Service Center in ways that the Lead Center could not directly. J.A. at 798, 806-807, 818.

Howard closely controls the personnel practices of each Service Center, in some cases dictating who must be hired and fired. The Lead Center "must concur" in the hiring of each Service Center Director and participates in the hiring decision for all other employees, as well as in their performance reviews. J.A. at 794-795, 797, 851. In practice, Howard can force a Service Center to hire a particular person for the Center Director position. J.A. at 815. Each Service Center is "required to notify the Lead Center, in writing," of most personnel actions, and must submit a job description and qualifications for every position to the Lead Center. J.A. at 795. Howard defines the responsibilities of the Service Center Director, business consultants and administrative staff. J.A. at 795. Howard further limits the authority of the Center Director in carrying out these responsibilities, for instance by requiring her to obtain permission from the Lead Center to conduct educational workshops. J.A. at 815. Howard requires each Center Director to attend training at the Lead Center, as well as a new employee orientation. J.A. at 780-781.

Howard also subjects Service Centers to a number of record-keeping requirements. Generally, Service Centers are required to maintain client records in accordance with Howard policies. J.A. at 760. The SOP requires Service Centers to send time and attendance reports "weekly to the Lead Center, on the Tuesday following the week reported." J.A. at 783. Service Centers are required to mail copies of client records to the Lead Center and to store client records in a central database called CenterIC. J.A. at 785. The SOP requires Service Centers to have an affirmative action plan and provides that the Lead Center will monitor compliance with the plan and other policies on a spot-check basis. J.A. at 794. Service Centers are also required to file employment records with the Lead Center. J.A. at 780.

UDC had a sub-grant to operate a Service Center from at least 2000 until 2011. J.A. at 839. In every year from 2006 to 2011, all SBDC Service Centers failed to meet the performance goals specified in their subcontracts with Howard. J.A. at 766, 838, 920-921, 850. For most of that period, the Lead Center also failed to meet its contractual goals under the SBA grant. J.A. at 808, 811, 766, 850, 838, 920-921. Despite this consistent failure to meet contractual performance goals, Howard did not terminate any sub-grants, or place any Service Centers on probation, until it terminated UDC's sub-grant in 2011. J.A. at 859, 876-877. Howard renewed all other Service Centers' sub-grants in 2012. J.A. at 855, 859.

The Lead Center is run by the Executive Director, who reports to the Dean of the Howard University School of Business, Barron Harvey. J.A. at 835. Henry Turner was the Executive Director of the Lead Center from January 2009 to July 2010. J.A. at 835, 841. Darrell Brown became Executive Director on February 28, 2011. J.A. at 761.

Miles was hired as the Center Director for the UDC Service Center in January 2009. J.A. at 824. Miles was recommended for the position by the Lead Center. J.A. at 836. Charlie Mahone, then the Dean of UDC's School of Business Administration, testified that, once the Lead Center recommended Miles, UDC "was not free to" object to her appointment as Center Director. J.A. at 797. Miles reported directly to the Executive Director at the Lead Center, who was solely responsible for overseeing the day-to-day operations of the UDC Center. J.A. at 797, 809-10, 820. Miles only met with Dean Mahone every month and a half. J.A. at 810. Dean Mahone was explicitly instructed by Henry Turner not to involve himself in the day-to-day operations of the UDC Center. J.A. at 810, 821.

Dean Mahone testified that Howard exercised "tremendous oversight" over the daily operations of the UDC Center under Miles's leadership. J.A. at 812. Howard had to approve all of the UDC Center's performance goals and imposed certain performance goals on the UDC Center. J.A. at 828, 812. Howard even unilaterally increased some performance goals in the course of a contract year, such as the number of counseling hours the UDC Center was required to provide. J.A. at 812. Howard limited Miles's discretion to choose strategies to meet those performance goals and carefully prescribed her responsibilities as Center Director. J.A. at 794, 812. Howard conducted a semi-annual performance review of Miles and the UDC Service Center. J.A. at 900.

In addition, Miles was required to attend monthly meetings with the Executive Director, where she was required to report the UDC Center's progress on contractual milestones. J.A. at 813-814, 827. These meetings typically lasted all day. J.A. at 827. During these meetings, the Executive Director instructed Miles to conduct counseling and marketing in certain ways and instructed her as to how to hold workshops. J.A. at 822. Howard also required Miles to attend and host certain meetings and workshops; however, Miles had to receive the Lead Center's permission in order to conduct a workshop. J.A. at 815, 854, 837. On at least one occasion, the Lead Center denied Miles permission to conduct a workshop. J.A. at 815. Howard also required Miles to attend SBDC training events. J.A. at 779-780, 837. UDC did not train Miles for her position as Center Director. J.A. at 854.

Miles's employment as Center Director was wholly dependent on Howard's continued funding of the UDC Center. Her compensation was "a hundred percent paid for out of the $100,000 grant that was allocated from Howard to UDC." J.A. at 798. Consequently, if Howard rescinded UDC's grant funding, Miles's employment would necessarily be terminated. J.A. at 798. Because Miles was a grant employee, UDC policy foreclosed hiring her directly as a UDC employee in the event Howard pulled the funding. J.A. at 798, 806-807. As Dean Mahone testified, the decision to terminate Miles's employment necessarily followed from Howard's action of cancelling UDC's grant funding in 2011. J.A. at 818.

Even before Miles became UDC Center Director in 2009, the Lead Center was aware that the UDC Center was underperforming and not "having any economic impact in terms of helping small businesses." J.A. at 839, 843-848. In fact, the Lead Center had considered terminating the UDC sub-grant prior to Miles's becoming Center Director in 2009. J.A. at 839, 826. The UDC Center was not an exception, however, as the SBA repeatedly voiced its dissatisfaction with the entire DC SBDC network to the Lead Center. J.A. at 840.

Every Center consistently failed to meet performance goals. J.A. at 808, 811, 766, 838, 920-921. William Hague, Director of the AEDC Center, noted that the performance goals were "unrealistic" and that no Service Center had met the counseling hours target "in the last seven years." J.A. at 850. As Dean Mahone testified, this systemic failure was mainly due to the way Howard had structured the network and developed the performance goals. J.A. at 811, 816-817. Dean Mahone further testified that the management of the UDC Center could have little impact on its performance, in light of these structural flaws:

> Q. Okay. At this point were you wondering
> whether UDC could ever meet the – the targets that
> were set in the contract?
> A. I was absolutely clear that, as presently
> structured, the network was never going to meet the
> numbers, and as a part of that, UDC was never going to
> meet the numbers.

J.A. at 819.

Vacancies in high-ranking positions were common throughout DC SBDC. Before Miles was hired as UDC's Center Director in 2009, the position had been vacant for six months. J.A. at 857. The D.C. Chamber of Commerce Service Center Director position was also vacant for almost a year in 2011. J.A. at 766, 851-852. During that period, the D.C. Chamber Center referred clients to other Service Centers; the D.C. Chamber Center was never placed on probation or shut down due to this vacancy. 851-852. In April 2010, DC SBDC's training director, Dr. SaFiya Hoskins, resigned, and in July 2010, DC SBDC's Finance Director, Charles Webb, resigned. J.A. at 854. After Turner left the Lead Center in July 2010, the Lead Center was being run by an Associate State Director, an acting Director of Finance, and an administrative assistant. J.A. at 855. Despite these frequent vacancies, the Lead Center did not close any Service Centers until it shut down the UDC Center in May 2011. J.A. at 765.

Miles learned that she was pregnant in August 2010. J.A. at 831. Miles promptly informed her assistant, Aura Garcia, as well as several other UDC staff and other personnel throughout the DC SBDC network of her pregnancy and need to take maternity leave. J.A. at 857, 851. Miles informed Dean Mahone of her pregnancy and of her need for maternity leave in or around October 2010. J.A. at 833, 855. Miles informed the entire Lead Center (in person) of her pregnancy in January 2011, including Eldridge Allen, then the acting Executive Director. J.A. at

832. Throughout the fall and winter of 2010, Miles worked with Garcia to arrange for the UDC Center to continue to provide service while referring clients to other Service Centers. J.A. at 857-858. This plan included referring clients to the AEDC Service Center. J.A. at 851. Howard trained Service Center staff to refer clients between Service Centers as an operational practice. J.A. at 858.

On around March 7, 2011, Miles's doctor unexpectedly placed her on bed rest due to complications with her pregnancy. J.A. at 829-830. Miles promptly informed Mahone and other senior DC SBDC staff of her leave. J.A. at 862-863. UDC promptly approved Miles's leave. J.A. at 918. Prior to Miles going on this unexpected leave, Dean Mahone had never been told by the Lead Center of a requirement to have a continuity plan in place in the event of a vacancy in the Center Director position, including when the position was vacant prior to Miles's hiring. J.A. at 800. DC SBDC does not have a policy that requires sub-grantees to have a continuity plan in place in the event an employee becomes pregnant. J.A. at 769.

When Brown started as Executive Director in February 2011, he was aware that all of the Service Centers were chronically underperforming and that the DC SBDC's accreditation was in jeopardy. J.A. at 763-764. Miles notified Brown on March 14, 2011, that she had started her FMLA leave and that she planned to return between June 27 and July 25, 2011. J.A. at 862-863. Brown testified that, as of this date, he had no intention of shutting down the UDC Service Center. J.A. at 762. Brown also learned on that date that the UDC Center planned to refer clients to other Service Centers during Miles's leave. J.A. at 765. Brown responded to Miles the same day, asking how long her leave would be. J.A. at 862-863.

On April 1, 2011, Brown met with Dean Mahone, Dean Barron Harvey and Debbie Childers to discuss the performance of the UDC Service Center. J.A. at 767. At that meeting, Brown suggested, for the first time, replacing Miles as the Center Director. J.A. at 767, 799. Mahone responded that he "would not do that," in part because he believed it would be illegal to remove Miles while she was on FMLA leave. J.A. at 767-768, 801-802. Brown testified that whether it was illegal to do so was not "something that I needed to be concerned about because she was not an employee of Howard University." J.A. at 768.

On April 7, 2011, Brown sent Dean Mahone a letter stating that the performance "of the DC SBDC is seriously deficient." J.A. at 867. As evidence of this deficiency, Brown cited the fact that Miles went on maternity leave "without prior notification to the Executive Director" and without "communicat[ing] to the Executive Director a specific date and time for returning to work." J.A. at 867. Brown stated that he was putting the UDC Center on probation and that UDC was required to submit a Recovery Plan detailing how the Service Center would meet its contractual goals going forward. J.A. at 867-868.

Brown suggested that, in its Recovery Plan, UDC replace Miles as Service Center Director. J.A. at 867-868. In the event UDC replaced Miles, Brown stated that "the final selection of a new Service Center Director shall be subject to the Lead Center's approval." J.A. at 868. Brown had no intention of shutting down the UDC Service Center as of the time that he sent this letter. J.A. at 765. Mahone responded to Brown's letter on May 6, 2011, in which he noted that Brown's characterization of Miles's leave was "misleading," since the unexpected instruction from her doctor to go on immediate bed-rest rendered advance notification to the Lead Center impossible. J.A. at 874. Mahone noted that Brown was never concerned "as to why every center in the [DC SBDC] network [was] not performing." J.A. at 810-811. Mahone also testified that he did not think that the UDC Center's status as the worst performing in the network had anything to do with Miles's leadership. J.A. at 811.

Miles received a copy of Brown's April 7 letter in late April 2011. J.A. at 910-916. In an April 28, 2011, email to Dean Mahone, Miles provided a detailed response to the letter, rebutting Brown's accusations against her and expressly opposing Brown's characterization of "my leave as "abandonment" of my position." J.A. at 914. Miles also objected to Brown basing his criticisms of the UDC Center on Miles's FMLA leave and the fact that he "would irrationally attack my federally authorized leave." J.A. at 914. Mahone responded to Miles's April

28, 2011, email on May 3, 2011, acknowledging that he read her April 28, 2011, email. J.A. at 911-912.

In a letter dated May 11, 2011, Brown notified Mahone that UDC's failure to provide an adequate recovery plan in response to Brown's April 7 letter had "caused a default of the agreement." J.A. at 877. Brown stated that the Lead Center would terminate UDC's sub-grant in 30 days unless Mahone agreed within 7 days "to the following non-negotiable conditions:

> 1. provide appropriate new leadership for the Center within sixty (30) days subject to the Lead Center's approval;
> 2. restructure the Center to include only a Center Director and business counselor within thirty (30) days (Center Director and business counselor must have the appropriate skill level and subject to the Lead Center's approval see, attached position descriptions);
> 3. the new Center Director will hire a new business counselor within thirty (30) days of the new Center Director being hired (the posting of the counselor job must begin immediately);
> 4. the selection of the new business counselor will be subject to the Lead Center's approval;
> 5. the new Center Director will submit to the Lead Center a proper recovery plan and marketing plan within one (1) month of being hired. Both plans will be subject to the Leads Center approval.
>
> **Failure to agree in writing to these non-negotiable conditions will result in the termination of the UDC's Sub-agreement effective June 10, 2011.** Should you agree to these conditions, the UDC service center will avoid default and termination.

J.A. at 877 (emphasis in original).

Mahone testified that, between the April 7 and May 11, 2011, letters, Brown was "increasing demands" of Mahone in terms of what was required of him in order "to save the [UDC] Center." J.A. at 803. Mahone understood the idea of replacing Miles as being merely "something I should consider" in response to Brown's April 7, 2011, letter, whereas in Brown's May 11, 2011, letter, it was something "that he was demanding" be done "or else the center was going to be terminated." J.A. at 803-804. Brown himself acknowledged that permanently replacing Miles as Center Director, as opposed to filling the position temporarily until she returned from leave, was a condition of continued funding to UDC. J.A. at 770. Brown had no reason to believe that Miles did not intend to return to the UDC Center at the end of her FMLA leave. J.A. at 770. UDC had no intention of terminating Miles's employment when she returned from FMLA leave. J.A. at 807.

On May 12, 2011, Brown held a meeting with Mahone, Barron Harvey, Don Williams and likely Dean Sirjue to discuss the status of the UDC Center. J.A. at 771-772. Brown testified that at this meeting, Mahone "became unhinged" and said "I don't have to fucking do this" regarding Brown's five non-negotiable conditions. J.A. at 772. Mahone denied using profanity at the meeting and testified that at this meeting he told Brown that what Howard was asking of him was "illegal." J.A. at 805. Howard's response "was, in essence, take it or leave it." J.A.

at 805. The Lead Center made the decision to terminate the UDC sub-grant on May 12, 2011, after this meeting. J.A. at 773.

On May 20, 2011, Mahone emailed Barron Harvey to express his disappointment that Howard had terminated the sub-grant. J.A. at 880. Mahone noted in his email that, even after he provided his recovery plan to Brown on May 6, 2011, Brown "demanded additional requirements which even you agreed that UDC could not practically and perhaps legally fulfill." J.A. at 880. Harvey recalled Mahone telling him that terminating Miles while was she was on FMLA leave was likely illegal, and that his response to Mahone was, "you may be right." J.A. at 883. When asked whether any other Service Center Directors were required to have a continuity plan in place for an unexpected leave, Harvey responded: "We didn't have any other service center directors pregnant." J.A. at 884.

As the direct result of Howard's termination of the UDC sub-grant, Miles's employment as Center Director was terminated. J.A. at 893 ("Howard terminated the UDC SBDC Service Center subgrant and, as a result, UDC had no choice but to terminate Plaintiff's employment"). By cancelling the grant funding, Howard "de facto terminated" Miles's employment. J.A. at 798. Because UDC policy prohibited converting Miles, a grant employee, into a University employee, it "was not possible" for UDC to directly employ Miles in another position after Howard terminated the funding for her position. J.A. at 806-807, 818. Miles's employment was formally terminated on June 30, 2011. J.A. at 825.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Howard's motion for summary judgment based upon its claim that it was not a joint employer of Miles and thus could not be held liable for violations of the FMLA, DCFMLA, DCHRA, or Title VII. This error occurred when the District Court credited evidence proffered by Howard while at the same time failing to acknowledge key evidence offered by Miles as the nonmoving party. Moreover, the District Court erred in granting summary judgment when it credited evidence proffered by Howard that justified its termination of Miles's employment while at the same time failing to acknowledge key evidence offered by Miles that Howard's stated rationale was pretextual.

Specifically, in the matter below Miles proffered evidence demonstrating that she was an employee of both Howard and UDC in her job as the manager of a small business center that provided training and educational services to local small businesses in the District of Columbia. Howard oversaw and controlled the funding for the small business center, which was located at UDC. Howard and UDC hired Miles as the director of the UDC center in early 2009, at a point when the UDC center's underperformance was already well known to Howard. In the summer of 2010, Miles became pregnant and promptly informed her staff and her supervisors at Howard of her need to take maternity leave. Miles applied for and was approved to take FMLA leave, which she planned to begin in April 2011.

In early March 2011, Miles's doctor directed her to immediately go on bed rest for the duration of her pregnancy. She promptly conveyed to her staff at UDC and her supervisors at Howard University that she would need to start her FMLA leave early. Shortly thereafter, Darrell Brown, Howard's Executive Director of its network of small business centers, began pressuring the Dean of UDC's business school (which housed and partially funded UDC's small business center) to replace Miles, citing concerns that Howard University believed Miles had "abandoned" her position by taking FMLA leave.

Charlie Mahone, the Dean of UDC's business school, testified that he refused to replace Miles because he believed that what Howard was asking him to do was illegal. Brown, in response, unequivocally told Mahone that Howard "would terminate UDC's sub-grant" unless Mahone agreed within seven days to a list of non-negotiable conditions, one of which was terminating Miles and replacing her with a new center director, to be approved first by Howard University. Mahone testified that UDC refused to break the law by terminating Miles because she took FMLA leave, and, as a result, Howard shut down the UDC center and terminated its grant funding. Because Miles's position was funded entirely by the grant funding, Howard's closure of the UDC center terminated her employment.

STANDARD OF REVIEW

A court's grant of summary judgment is reviewed *de novo* and should be affirmed "only if the record demonstrates both that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." *Solomon v. Vilsack*, 763 F.3d 1, 8 (D.C. Cir. 2014) (internal quotations omitted). When deciding a motion for summary judgment, the "judge's function… is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Tolan held that reversal of summary judgment is warranted where "the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan*, 134 S. Ct. at 1867-68. This is so because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. At the summary judgment stage, the judge's task "is not to determine the truth of the matter, but to decide only whether there is a genuine issue for trial." *Solomon*, 763 F.3d at 9 (internal quotations omitted). In doing so, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Tolan*, 134 S. Ct. at 1866 (quoting *Anderson*, 477 U.S. at 255).

A court should review all of the evidence in the record and must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990); *Liberty Lobby*, 477 U.S. at 254; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, 477 U.S. at 255. "The court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000) (citation omitted).

ARGUMENT

I. MILES SUBMITTED SUFFICIENT EVIDENCE FOR A JURY TO DETERMINE THAT HOWARD WAS MILES'S JOINT EMPLOYER.

The District Court erred when it granted summary judgment in Howard's favor on the ground that it was not a joint employer of Miles and thus could not be held liable for violations of the FMLA, DCFMLA, DCHRA, or Title VII. In reaching this errant conclusion, the District Court applied two multi-factor factual tests to resolve the joint employer question: the Third Circuit's test in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), and this Court's test in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979).[1] Both tests "comprise fact-intensive inquiries that center largely on the amount of control an employer has over an employee." *Miles v. Univ. of Dist. of Columbia*, No. 12-378 (RBW), 2013 WL 5817657, at *8 (D.D.C. Oct. 30, 2013), ECF No. 36; *see also Redd v. Summers*, 232 F.3d 933, 938 (D.C. Cir. 2000) (declining to "try to resolve which test [*Browning-Ferris* or *Spirides*] is applicable or indeed whether there is a material difference between the two").

[1] Although the FMLA implementing regulations contain a joint employment test, 29 C.F.R. § 825.106(a) (2012), the District Court noted that courts in this Circuit generally employ either the *Browning-Ferris* or *Spirides* tests to resolve joint employment issues. J.A. at 1045. Accordingly, the District Court treated the *Browning-Ferris* and *Spirides* tests as controlling and conducted a single joint employer analysis for Miles's FMLA, DCFMLA, Title VII, and DCHRA claims. J.A. at 1045.

In *Spirides*, this Court formulated a test to determine whether the plaintiff was an employee or an independent contractor for purposes of Title VII of the Civil Rights Act of 1964. *See* 613 F.2d at 831. While noting that "[c]onsideration of all of the circumstances surrounding the work relationship is essential," this Court stressed that "the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor[.]" *Id*. "If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist." *Id*. at 831-32. In addition to 'control,' *Spirides* listed eleven "[a]dditional matters of fact" to consider. *Id*. at 832 (listing factors).

This Court simplified the *Spirides* test in *Redd*, explaining that "the putative employer's right to control the 'means and manner' of the worker's performance" is the "central" factor. 232 F.3d at 938. As to the additional *Spirides* factors, the *Redd* court organized them into four categories: "the intent of the parties, primarily as reflected in the contract between the 'contractor' and its 'client'"; "whether contracting out work is justifiable as a prudent business decision"; "whether the business is exercising a degree of control that seems excessive in comparison to a reasonable client-contractor relationship in the same circumstances"; and "whether the relationship shares attributes commonly found in arrangements with independent contractors or with employees." *Id*. at 939-40.

In *Redd*, this Court noted that *Browning-Ferris* is the preferred method for resolving joint employment issues. *Id*. at 938. That test directs courts to consider "whether one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control over the terms and conditions of employment of the employees who are employed by the other employer." *Id*. (quoting *Browning-Ferris*, 691 F.2d at 1123). This question is "essentially a factual issue." *Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. N.L.R.B.*, 363 F.3d 437, 440 (D.C. Cir. 2004) (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)). *Browning-Ferris* is the preferred approach because it addresses situations where the plaintiff may be an employee of two entities at once, while *Spirides* was concerned with whether a person is properly classified as an employee or an independent contractor. *See Redd*, 232 F.3d at 937; *see also Harris v. Atty. General of U.S.*, 657 F. Supp. 2d 1, 9-10 (D.D.C. 2009).

However, the District Court's conclusion that Howard was not Miles's joint employer under *Spirides* is flawed for three reasons:

1. The District Court failed to consider all of the evidence in the record, instead relying primarily on Howard's evidence and ignoring Miles's evidence;

2. The District Court viewed the evidence in a light most favorable to Howard by weighing evidence and making credibility determinations; and

3. The District Court selectively applied the *Browning-Ferris* and *Spirides* factors by focusing on the formalities of the relationship between Howard and Miles instead of considering the totality of the circumstances.

As noted in Miles's summary judgment opposition brief and supporting exhibits (J.A. at 672-707, 757-935), Howard's joint employer relationship is demonstrated by its control over hiring individuals in Miles's position, that of the UDC Service Center Director, and its ability to terminate Miles's employment. Howard's Standard Operating Procedures ("SOP") provide that Howard's Lead Center ("the Lead Center") "must concur" in the hiring of each respective Center Director, including Miles. J.A. at 794. In fact, UDC's Dean Charlie Mahone testified that once the Lead Center recommended Miles for Center Director, UDC had no choice but to hire her. J.A. at 815-816. And when Howard suggested (and later demanded) that UDC remove Miles, Howard mandated that "the final selection of a new Service Center Director shall be subject to [Howard's] approval." J.A. at 872, 877.

Howard also had the ability to terminate Miles's employment through its rescission of the UDC sub-grant. In April 2011, Howard leveraged this authority for the specific purpose of coercing Dean Mahone into removing Miles from the Center's Director position. J.A. at 872, 877. After Mahone refused to do so, Howard terminated UDC's grant funding, which had the necessary effect of terminating Miles's employment. J.A. at 798, 806-807, 818, 889. As noted above, Miles would have continued to be employed as Center's Director upon her return from leave but for Howard's termination of the UDC sub-grant. J.A. at 770, 807.

Howard directed Miles's work, "not only as to the result to be achieved, but also as to the details by which that result is achieved." *Spirides*, 613 F.2d at 832. Howard prescribed the performance goals that the UDC Center, under Miles's leadership, was required to meet. J.A. at 812, 828. Howard also limited Miles's discretion to choose strategies to meet those goals, such as by requiring her to obtain the Lead Center's permission to hold workshops. J.A. at 812, 815. Howard required Miles to attend all-day meetings with the Executive Director, at which she reported the UDC Center's progress on contractual milestones. J.A. at 813-814, 827. During these meetings, the Executive Director instructed Miles to conduct counseling, marketing and workshops in certain ways. J.A. at 822. Howard also required Miles to attend SBDC training events and a new employee orientation. J.A. at 779-780, 837. Miles reported directly to the Executive Director of the Lead

Center, a Howard employee, who was solely responsible for oversight of the daily operations of the UDC Center. J.A. at 797, 810, 820-821. Howard also conducted semi-annual performance reviews of Miles. J.A. at 779, 900.

Howard also indirectly controlled Miles's salary and benefits through its control over the amount of grant funding to UDC. Miles's compensation "was a hundred percent paid for out of the $100,000" sub-grant to UDC; no other source of funding existed from which to pay her. J.A. at 798, 818. Thus the amount Miles received as compensation was determined by the amount of grant funding that Howard provided to UDC for the Service Center. J.A. at 818. Howard also maintained copies of Miles's employment records, namely, her weekly time and attendance reports and performance evaluations. J.A. at 781.

Howard clearly intended for Miles to work "under the direction of a supervisor" and did not see her as "a specialist without supervision." *Spirides*, 613 F.2d at 832. The Executive Director at the Lead Center was solely responsible for overseeing the day-to-day operations of the UDC Center; in fact, Howard even instructed UDC's Dean Mahone not to involve himself in the Center's daily operations. J.A. at 797, 809-810, 820-821. Moreover, Brown's admonishing Miles for starting her FMLA leave without giving him prior notice shows that Howard expected to be informed promptly of any leave, even if unanticipated. J.A. at 866-

869, 766, 783. That Brown monitored Miles's work schedule this closely is further proof that Howard intended for her to work "under the direction of a supervisor."

The "manner in which the work relationship [was] terminated" is further indicia of a joint employer relationship, as Miles's termination was the direct result of Howard's action. When Howard rescinded the funding for the UDC sub-grant, "UDC had no choice but to terminate [Miles's] employment." J.A. at 888-889. Dean Mahone testified that Howard "de facto terminated" Miles by rescinding UDC's grant funding. J.A. at 798. UDC had no intention of terminating Miles if the UDC Center had remained open. J.A. at 807. That Howard was solely responsible for the termination of Miles's employment is probative of an employer-employee relationship.

II. MILES PROFFRED SUFFICIENT EVIDENCE FOR A JURY TO FIND FOR HER UNDER THE FMLA AND DCFMLA.

The District Court also granted summary judgment in Howard's favor on the ground that Howard presented evidence of a "legitimate business reason" for terminating the UDC contract, and hence Miles had not met her burden to present evidence from which a reasonable jury could find that Howard's stated reason was pretext. However, in coming to its conclusion Miles submits that the District Court erred by again failing properly to acknowledge key evidence offered by Miles in her opposition to Howard's motion for summary judgment on this issue.

A plaintiff has stated a prima facie case of retaliation under the FMLA and DCFMLA when she shows that: (1) she exercised a right protected by the FMLA; (2) she suffered an adverse employment action; and (3) there was a causal connection between the exercise of her rights and the adverse employment action. *See Roseboro v. Billington*, 606 F. Supp. 2d 104, 109 (D.D.C. 2009).[2] Once a plaintiff establishes a prima facie case, the employer bears the burden of articulating a legitimate reason for the adverse action. *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1367 (D.C. Cir. 2000). If the employer articulates a legitimate reason, the burden then shifts back to the employee to show that the proffered reasons were pretextual or that the employer took the adverse action because the employee engaged in protected activity. *Reeves*, 530 U.S. at 148. One way to rebut the claimed business reason is to show "weakness, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons…[such] that a reasonable factfinder could rationally find them unworthy of credence and…infer that the employer did not act for" the proffered reasons. *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007); *see also Roseboro*, 606 F. Supp. 2d at 109-10.

Federal courts have counseled that judges should be sensitive to the "myriad of ways" an inference can be created showing that the employer did not act for its

[2] The District Court noted that "Howard concedes that the plaintiff has established a prima facie case of retaliation." J.A. at 1058.

proffered reasons. *EEOC v. Metal Service Co.*, 892 F.2d 341, 348 (3d Cir. 1990). The First Circuit has further noted that "where a plaintiff in a discrimination case makes out a prima facie case and the issue becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be 'particularly cautious' about granting the employer's motion for summary judgment." *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 167 (1st Cir. 1998) (citing *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 928 (1st Cir. 1983)).

In her opposition, Miles proffered sufficient evidence to show that her FMLA leave was a motivating factor in Howard's adverse employment actions. Brown singled out Miles's FMLA leave as a reason for placing the UDC Center on probation, and Howard only made the decision to shut down the UDC Center because Mahone was not going to terminate Miles. J.A. at 772-773. Moreover, Howard's Dean Barron Harvey's testimony that Howard's requirement of a continuity plan only applied to Miles because she was pregnant is probative of discriminatory animus against employees who take maternity leave. J.A. at 884.

Moreover, Miles proffered evidence undermining Howard's alleged business reason for terminating the UDC sub-grant – that the UDC Center was "the worst performing in the network" and had dim prospects of improvement. As an initial matter, Miles proffered that the performance of the DC SBDC network as a whole had been suffering for years before she was hired. J.A. at 808, 811, 766, 838, 850. Moreover, dissatisfaction with the entire network was nothing new; Harvey had repeatedly voiced his concerns about the network to the Lead Center. J.A. at 840. Despite these well-known, long-standing systemic flaws with the DC SBDC network, Howard did not decide to terminate any sub-grants until May 2011, after it became aware of the duration of Miles's FMLA leave and after it demanded her termination. J.A. at 766, 876-877.

Moreover, none of the UDC Center's alleged deficiencies were unique to UDC, as these problems were pervasive throughout the network. Each Service Center consistently failed to meet contractual performance goals. J.A. at 808, 811, 766, 838, 920-921, 850. The network as a whole was plagued by high turnover and semi-permanent vacancies in leadership positions. J.A. at 817-818, 732, 820-821. The performance failures stemmed from Howard's structure of the network, such that "UDC was never going to meet the numbers." J.A. at 819. William Hague, Director of the AEDC Center (a sister center to the UDC Center that Miles directed), noted that the performance metrics were "unrealistic" and that no Service Center had met the counseling hours target "in the last seven years." J.A. at 850.

Despite these fundamental flaws with the DC SBDC network's structure, Brown became singularly focused on the UDC Service Center after he learned that

Miles was out on maternity leave. As Dean Mahone testified, Brown was never concerned "as to why every center in the [DC SBDC] network [was] not performing." J.A. at 810-811. Mahone did not believe that the UDC Center's underperformance had anything to do with Miles's leadership. J.A. at 811. In fact, Mahone testified that the management of the UDC Center could have little impact on its performance in light of the network's structural flaws. J.A. at 819. Nevertheless, Howard did not at any time apply the level of scrutiny to other Service Centers that Brown did to the UDC Center in the spring of 2011, after he learned of Miles's FMLA leave. J.A. at 810-811.

That Howard claimed it considered terminating the UDC subcontract long before Miles took leave hardly weighs in Howard's favor. On the one hand, Howard claims that the problems at the UDC Center "reached a crisis point" in late 2010; at the same time, Howard stresses that it was acutely aware of these same problems for several years yet did nothing. J.A. at 810-811. Indeed, even before Miles was hired, Howard not only knew that the UDC Center was not "having any economic impact," but it was actively considered terminating the UDC sub-grant. J.A. at 839, 826. The SBA had been voicing its frustrations with the entire DC SBDC Network to the Lead Center since at least 2010, such that the deferral of the network's accreditation in 2011 was hardly a surprise. J.A. at 828. In short, that Howard was aware of the UDC Center's performance failures for nearly a decade but chose not to do anything until May 2011 after it learned that Miles was out on maternity leave undermines its claim that this was Howard's actual motive for closing the Center.

Moreover, Howard's Brown unequivocally pointed to Miles's FMLA leave as a basis for threatening to terminate the UDC sub-grant, insisting that UDC replace her as a condition of continued funding. J.A. at 866-869, 876-877. Further, Brown's and Barron Harvey's testimony make clear that the lack of a continuity plan was deeply concerning when the UDC Center Director was on FMLA leave for two months but was immaterial when the D.C. Chamber Center lacked a Center Director for almost an entire year, during which time it (like the UDC Center) referred clients to other Service Centers in lieu of providing services. J.A. at 866-869, 766. The UDC Center was undoubtedly treated less "favorably" than an equally non-functioning Service Center, as Howard renewed the D.C. Chamber's sub-grant in 2012 after it terminated the UDC sub-grant. J.A. at 855, 859. Finally, the temporal proximity between Brown learning the duration of Miles's FMLA leave and his subsequent threats to terminate the UDC Service Center is itself probative of retaliatory intent. *Roseboro*, 606 F. Supp. 2d at 109.

As with Miles's FMLA claims, there is sufficient evidence to create an inference of discrimination. Howard's requirement of a continuity plan only applied to Miles because she was pregnant, but did not apply to employees who were not pregnant. J.A. at 884. Additionally, after the D.C. Chamber of Commerce Service Center Director, a male, left his post, the Center simply referred clients to other Service Centers – precisely the course that the UDC Center took during Miles's leave. J.A. at 851-852, 857-858. Howard cited the lack of services during Miles's leave as a basis for shutting down the UDC Center, but it was not at all concerned with the even longer interruption of services at the D.C. Chamber Center. That Howard singled out the UDC Center for the harshest punishment, yet took no action against the D.C. Chamber Center, strongly suggests that Howard took its action against Miles because of her membership in a protected class. J.A. at 766, 810-811.

III. MILES'S EVIDENTIARY PROFFER OF PRETEXT WAS SUFFICIENT FOR A JURY TO DETERMINE THAT HOWARD WAS LIABLE TO MILES UNDER THE DCHRA AND TITLE VII.

The District Court correctly noted that "the analytical framework for… [a] claim of retaliation [under the FMLA]… is essentially the same as that applicable to a claim of discrimination under Title VII." J.A. at 1065. Therefore, because Miles proffered sufficient evidence that Howard's proffered reason for terminating her employment was pretextual in nature, her DCHRA and Title VII claims also should not have been dismissed.

CONCLUSION

WHEREFORE, and for all the foregoing reasons, Miles respectfully requests that the decision of the District Court granting Defendant's motion for summary judgment be reversed and that the case be remanded to the District Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: September 18, 2015

/s/ Nicholas Woodfield
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of September, 2015, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 18th day of September, 2015, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

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ADDENDUM

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ADDENDUM

Federal Statutes

29 U.S.C.A. § 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if--

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

29 U.S.C.A. § 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C.A. § 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary--

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) Government Accountability Office and Library of Congress

In the case of the Government Accountability Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

42 U.S. Code § 2000e–2 - Unlawful employment practices

(a) Employer practicesIt shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practicesIt shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National securityNotwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
>
> (2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)

(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of “alternative employment practice”.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)

(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

Federal Regulations

29 C.F.R. § 825.215. Equivalent position.

(a) Equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Conditions to qualify. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent pay.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) Equivalent benefits. “Benefits” include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise

elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon

seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) Equivalent terms and conditions of employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) De minimis exception. The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

District of Columbia Statutes

§ 32–502. Family leave requirement.

(a) An employee shall be entitled to a total of 16 workweeks of family leave during any 24-month period for:

(1) The birth of a child of the employee;

(2) The placement of a child with the employee for adoption or foster care;

(3) The placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility; or

(4) The care of a family member of the employee who has a serious health condition.

(b) The entitlement to family leave under subsection (a)(1) through (3) of this section shall expire 12 months after the birth of the child or placement of the child with the employee.

(c) Subject to the requirements of subsection (h) of this section, in the case of a family member who has a serious health condition, the family leave may be taken intermittently when medically necessary.

(d) Upon agreement between the employer and the employee, family leave may be taken on a reduced leave schedule, during which the 16 workweeks of family leave may be taken over a period not to exceed 24 consecutive workweeks.

(e) (1) Except as provided in paragraphs (2) and (3) of this subsection, family leave may consist of unpaid leave.

(2) Any paid family, vacation, personal, or compensatory leave provided by an employer that the employee elects to use for family leave shall count against the 16 workweeks of allowable family leave provided in this chapter.

(3) If an employer has a program that allows an employee to use the paid leave of another employee under certain conditions, and the conditions have been met, the employee may use the paid leave as family leave and the leave shall count against the 16 workweeks of family leave provided in this chapter.

(4) Nothing in this section shall require an employer to provide paid family leave.

(f) If the necessity for leave under this section is foreseeable based on an expected birth or placement of a child with an employee, the employee shall provide the employer with reasonable prior notice of the expected birth or placement of a child with the employee.

(g) If the necessity for family leave under this section is foreseeable based on planned medical treatment or supervision, an employee shall:

(1) Provide the employer with reasonable prior notice of the medical treatment or supervision; and

(2) Make a reasonable effort to schedule the medical treatment or supervision, subject to the approval of the health care provider of the employee or family member, in a manner that does not disrupt unduly the operations of the employer.

(h) (1) If 2 family members are employees of the same employer:

(A) The employer may limit to 16 workweeks during a 24-month period the aggregate number of family leave workweeks to which the family members are entitled; and

(B) The employer may limit to 4 workweeks during a 24-month period the aggregate number of family leave workweeks to which the family members are entitled to take simultaneously.

(2) For the purposes of this subsection, the term "same employer" includes an office, division, subdivision, or other organizational section of an employer in which both employees have the same or interrelated duties and the absence of both employees would disrupt unduly the conduct of the employer's business.

(i) (1) Information that an employee gives to an employer regarding a family relationship, pursuant to which the employee seeks to take family leave under this section, shall be used only to make a decision in regard to the provisions of this chapter. An employer shall keep any information regarding the family relationship confidential.

(2) Any employer who willfully violates this subsection shall be assessed a civil penalty of $1,000 for each offense.

§ 32–507. Prohibited acts.

(a) It shall be unlawful for any person to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by this chapter.

(b) It shall be unlawful for an employer to discharge or discriminate in any manner against any person because the person:

(1) Opposes any practice made unlawful by this chapter;

(2) Pursuant or related to this chapter:

(A) Files or attempts to file a charge;

(B) Institutes or attempts to institute a proceeding; or

(C) Facilitates the institution of a proceeding; or

(3) Gives any information or testimony in connection with an inquiry or proceeding related to this chapter.

§ 32–510. Enforcement by civil action.

(a) Subject to the provisions in subsection (b) of this section, an employee or the Mayor may bring a civil action against any employer to enforce the provisions of this chapter in any court of competent jurisdiction.

(b) No civil action may be commenced more than 1 year after the occurrence or discovery of the alleged violation of this chapter.

(c) If a court determines that an employer violated any provision of this chapter, the damages provision prescribed in § 32-509(b)(6) and § 32-509(b)(7) shall apply.

§ 2–1401.01. Intent of Council.

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.

…

§ 2–1401.05. Discrimination based on pregnancy, childbirth, related medical conditions, or breastfeeding.

(a) For the purposes of interpreting this chapter, discrimination on the basis of sex shall include, but not be limited to, discrimination on the basis of pregnancy, childbirth, related medical conditions, or breastfeeding.

(b) Women affected by pregnancy, childbirth, related medical conditions, or breastfeeding shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and this requirement shall include, but not be limited to, a requirement that an employer must treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees with temporary disabilities.

§ 2–1402.01. General.

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.

§ 2–1402.11. Prohibitions.

(a) General — It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual:

(1) By an employer — To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his

compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;

(2) By an employment agency — To fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against, any individual; or

(3) By a labor organization — To exclude or to expel from its membership, or otherwise to discriminate against, any individual; or to limit, segregate, or classify its membership; or to classify, or fail, or refuse to refer for employment any individual in any way, which would deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment; or

(4) By an employer, employment agency or labor organization —

(A) To discriminate against any individual in admission to or the employment in, any program established to provide apprenticeship or other training or retraining, including an on-the-job training program;

(B) To print or publish, or cause to be printed or published, any notice or advertisement, or use any publication form, relating to employment by such an employer, or to membership in, or any classification or referral for employment by such a labor organization, or to any classification or referral for employment by such an employment agency, unlawfully indicating any preference, limitation, specification, or distinction, based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, gender identity or expression, family responsibilities, matriculation, genetic information, disability, or political affiliation of any individual.

(C) To request or require a genetic test of, or administer a genetic test to, any individual as a condition of employment, application for employment, or membership, or to seek to obtain, obtain, or use genetic information of an employee or applicant for employment or membership.

(b) Subterfuge — It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, matriculation, genetic information, disability, or political affiliation of any individual.

(c) Accommodation for religious observance —

(1) It shall further be an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee's religious observance by permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the employer undue hardship. An accommodation would cause an employer undue hardship when it would cause the employer to incur more than de minimis costs.

(2) Such an accommodation may be made by permitting the employee to work:

(A) During the employee's scheduled lunch time or other work breaks;

(B) Before or after the employee's usual working hours;

(C) Outside of the employer's normal business hours;

(D) During the employee's paid vacation days;

(E) During another employee's working hours as part of a voluntary swap with such other employee; or

(F) In any other manner that is mutually agreeable to the employer and employee.

(3) When an employee's request for a particular form of accommodation would cause undue hardship to the employer, the employer shall reasonably accommodate the employee in a manner that does not cause undue hardship to the employer. Where other means of accommodation would cause undue hardship to the employer, an employee shall have the option of taking leave without pay if granting leave without pay would not cause undue hardship to the employer.

(4) An employee shall notify the employer of the need for an accommodation at least 10 working days prior to the day or days for which the accommodation is needed, unless the need for the accommodation cannot reasonably be foreseen.

(5) In any proceeding brought under this section, the employer shall have the burden of establishing that it would be unable reasonably to accommodate an employee's religious observance without incurring an undue hardship, provided, however, that in the case of an employer that employs more than 5 but fewer than 15 full-time employees, or where accommodation of an employee's observance of a religious practice would require the employee to take more than 3 consecutive days off from work, the employee shall have the burden of establishing that the employer could reasonably accommodate the employee's religious observance without incurring an undue hardship; and provided further, that it shall be considered an undue hardship if an employer would be required to pay any additional compensation to an employee by reason of an accommodation for an employee's religious observance. The mere assumption that other employees with the same religious beliefs might also request accommodation shall not be considered evidence of undue hardship. An employer that employs 5 or fewer full-time employees shall be exempt from the provisions of this subsection.